

Protecting Content Online: The Interface of Copyright and Design for Websites, Apps, and GUIs

Sara Anne Hook, M.B.A., J.D.

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Introduction

- Intellectual property law continues to be challenged by new technologies.
- Questions remain about how to apply existing copyright law to digital works in all kinds of formats – text, databases, audio, video, websites, graphical user interfaces (GUIs) and apps (applications).
- The intent of developers is to make this digital material available on smaller and smaller devices.
- How much is this material truly “creative work” such that it should be eligible for copyright protection?
- How much is now somewhat standardized because of the nature of the devices and the timeframe in which the content has to be developed?
- Is copyright law the only – or even the best - way to protect this content?

What Is a Website and Why Is It Different?

- A website contains content that is individually eligible for copyright protection, such as text, images, video, audio, and databases (with databases having some special considerations), games, blogs, e-commerce ordering systems and user-provided content, to name but a few.
- The essence of a website – and what differentiates it from traditional print/tangible materials – is that the content is dynamic rather than static.
- In fact, because of Search Engine Optimization (SEO), an entity will want the content of its website to change on a frequent basis.
- Users expect fresh, new content and the latest in graphic design and features.
- Also, the conventions and trends of website usability have changed over time.
- Yet, there are some features of websites that are becoming increasingly standardized, because this is what the user expects in terms of usability and because there are so many options for “canned” website design.

What is a Website and Why Is It Different?

- A website has other attributes which transcend the actual content:
 - Style
 - Layout
 - Color scheme
 - Font
 - Flow
- These attributes might be considered the “look and feel” of a website.
- The “look and feel” of a website is something that an entity may want to protect as part of its branding.
- Even a simple website for a small non-profit organization will have changes to its content on a regular basis.
- See screenshot from the Wayback Machine – the grid at the top shows the number of times that this website was saved.

About the Presenter's Development of Websites

- Has been creating websites since 1995.
- Back then, websites had to be created using HTML coding – no software did this for you.
- Experienced infringement of two of her websites.
- Also unwanted alteration of the content, design and copyright management information (CMI), which predated the Digital Millennium Copyright Act (DMCA).
- In 2004, learned to use DreamWeaver software, which takes care of the HTML coding automatically.
- Is currently working with a graduate student, Ms. Shilpa Pachhapurkar, to totally redesign the website for Right Sharing of World Resources.

Registration of Paper-Based (“Permanent”) Works v. Websites

- When someone registers a paper-based work with the U.S. Copyright Office, or any work that is fixed in some physical format, the work that is registered is that version of the work.
- Care is needed when registering a website to make sure that the version that is registered matches the dates and other information indicated.
- Moreover, the real challenge is what to do with all of the different iterations of the website – not only the changes to the content, but also to the design of the website.
- In order to consider what pieces and parts – or the whole – of a website might be eligible for copyright protection, here is a simple website created by the author several years ago.
- Note the links, the color scheme, the layout, the content and the author’s logo.
- This is what we might call the “look” of the website.



E:\MHTP\index.html

Internet Archive Wayback Mac... MHTP

File Edit View Favorites Tools Help

IUPUIScholarWorks Repos... London Art College - dist... eDiscovery Assistant™ Canvas at IU Purdue OWL APA Formatt... New Online-Distance Edu... The Wor



Sara Anne Hook, CMP Intern

Certified Music Practitioner Intern
Music for Healing and Transition Program (MHTP)

Links

- [Main Page](#)
- [Cover Letter](#)
- [Letter from the MHTP Board](#)
- [Resume](#)
- [About My Instruments](#)
- [About the Music for Healing and Transition Program](#)
- [MHTP Code of Ethics](#)
- [What the Research Shows](#)
- [National Center for Complementary and Alternative Medicine](#)
- Other Information



"Music gives soul to the universe, wings to the mind, flight to the imagination, a charm to sadness, gaiety and life to everything. It is the essence of order and leads to all that is just, good and beautiful." Aristotle

What is a Certified Music Practitioner?

Please allow me to introduce myself. My name is Sara Anne Hook and I am completing my training as a Certified Music Practitioner (CMP) through the Music for Healing and Transition Program (MHTP). This national program prepares musicians to provide appropriate music as a therapeutic enhancement to the healing process and the life to death transition. As part of my training, I am required to do an internship consisting of 45 hours of providing live, healing music to patients in hospitals, hospices or nursing homes.

How Will Your Patients and Clients Benefit from Live Therapeutic Music?

Many research studies have documented the therapeutic value of music in hospitals, nursing homes, hospice settings and other health and wellness related facilities. Music is a valuable tool for physical, psychological and spiritual integration and wholeness through pitch, resonance and rhythm. Therapeutic music is being successfully used with patients who are critically ill or injured, chronically ill, pre- or post-surgery, suffering from dementia, comatose or dying as well in combination with wellness practices such as yoga and massage. It is important to note that providing this healing music is not a performance and it requires no interaction between the patient and the musician. It is a personal service that is offered one-on-one to the patient and that is specifically tailored to meet the needs of the listener. Your staff will also benefit from this music.

How I Can Serve in Your Facility?

Please contact me if you would be interested in providing live therapeutic

Cont.


- And here is the HTML code for the website.
- What is it that should be protected, especially considering that the DreamWeaver software actually produced the code automatically?

```
file:///I:/MHTP/index.html - Original Source
File Edit Format
1 <!DOCTYPE HTML PUBLIC "-//W3C//DTD HTML 4.01 Transitional//EN"
2 "http://www.w3.org/TR/html4/loose.dtd">
3 <html><!-- InstanceBegin template="/Templates/MHTP template.dwt" codeOutsideHTMIsLocked="false" -->
4 <head>
5 <!-- InstanceBeginEditable name="doctitle" -->
6 <title>MHTP </title>
7 <!-- InstanceEndEditable --><meta http-equiv="Content-Type" content="text/html; charset=iso-8859-1">
8 <style type="text/css">
9 <!--
10 .style4 {
11     font-weight: bold;
12     color: #000000;
13     font-size: 14px;
14     font-family: "Times New Roman", Times, serif;
15 }
16 a:link {
17     color: #669933;
18 }
19 a:visited {
20     color: #669933;
21 }
22 a:hover {
23     color: #669933;
24 }
25 a:active {
26     color: #669933;
27 }
28 body {
29     background-color: #FFFFFF;
30 }
31 h3 {
32     color: #999999;
33 }
34 .style6 {color: #669933}
35 -->
36 </style>
37 <!-- InstanceBeginEditable name="head" --><!-- InstanceEndEditable -->
38 </head>
39
40 <body>
41 <table width="749" height="3915" border="0" align="left" cellspacing="5">
42 <tr>
43 <td width="172" height="37" class="style4"><div align="center">
44 <h3><br>
45 </h3>
46 </div></td>
47 <td width="50">&nbsp;</td>
```

Where Should the Line Be Drawn Between Functionality and Creativity?

- ▶ Another question with protecting websites through copyright is where the line should be drawn between functionality and creativity.
- ▶ Note the similarities and differences in the approaches taken in these collages from various websites, prepared by Ms. Pachhapurkar, for several non-profit organizations (who evaluated more than 70 websites of NGOs).
- ▶ What pieces and parts could and should be protected by copyright law?
- ▶ What are the “conventions” that are similar across organizations that involve a minimal amount of creativity and that are more functional or standardized in nature?
- ▶ Moreover, given how often the content on the websites changes, is it worth trying to register each iteration of the website as a derivative work, which is what the copyright requirements suggest is necessary?

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MasterCard

Amex

Discover



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Your Information

Name * First Name Last Name

☐ Make donation anonymous

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Phone Number

Opt in ☒ It's OK to contact me in the future

Leave a comment Let us know why you donated, tell your story, or send words of encouragement.

3000 Character Limit

Payment Details

Name on the card * First Name Last Name

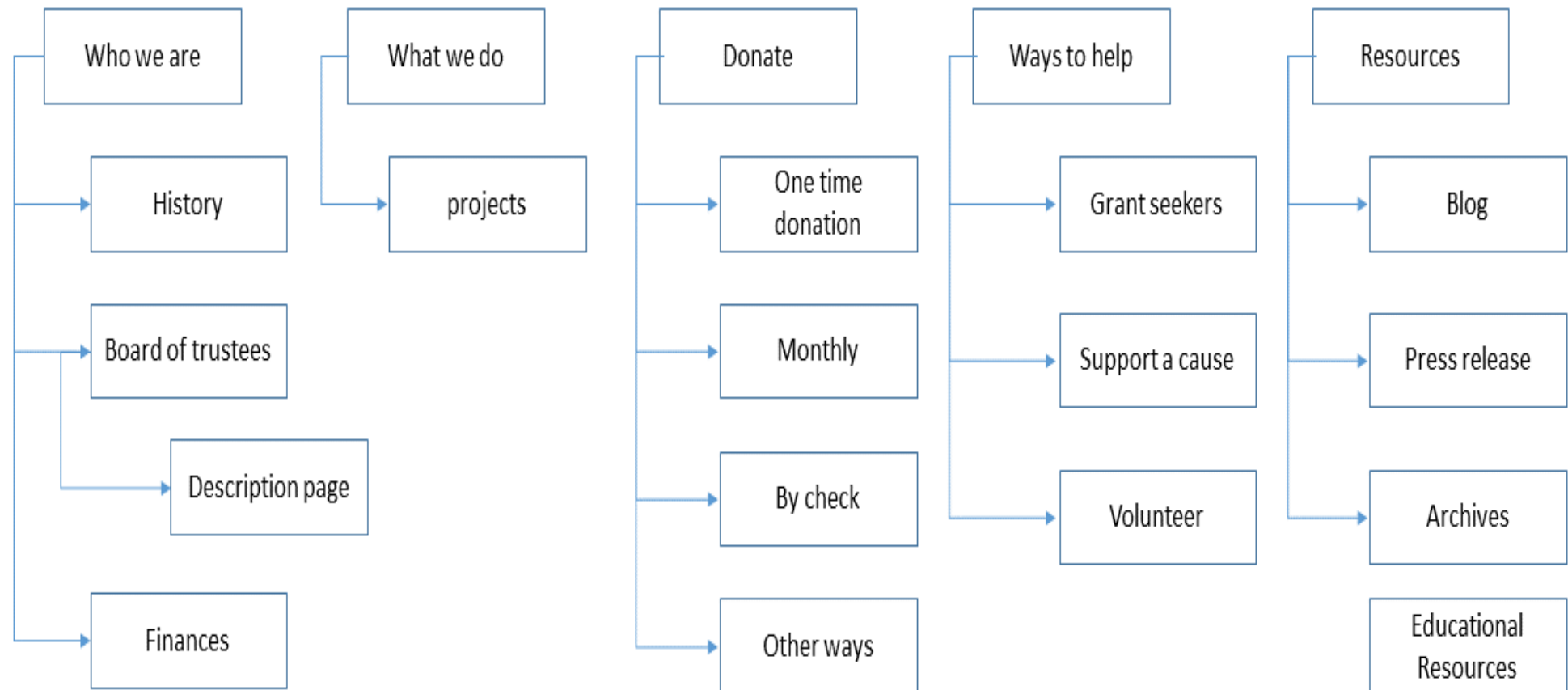
Card number *    



What Else About Website Design?

- If the graphical user interface provides the “look” of a website, the information architecture provides the “feel” – the flow of the website as a user navigates from one section to another.
- For example, the next slide is Ms. Pachhapurkar’s plan for the information architecture of a proposed redesign of the website for Right Sharing of World Resources.
- Two additional slides show her initial wireframes for the re-design of the Right Sharing of World Resources website.
- If we compare these wireframes with the existing website, it is obvious that there are changes.
- However, some of these changes are because of the trends in usability and the increasing standardization of website design, such as the placement and names of headings on the top right-hand side of the screen.

RSWR Information Architecture



Right Sharing Of World Resources

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Our Vision



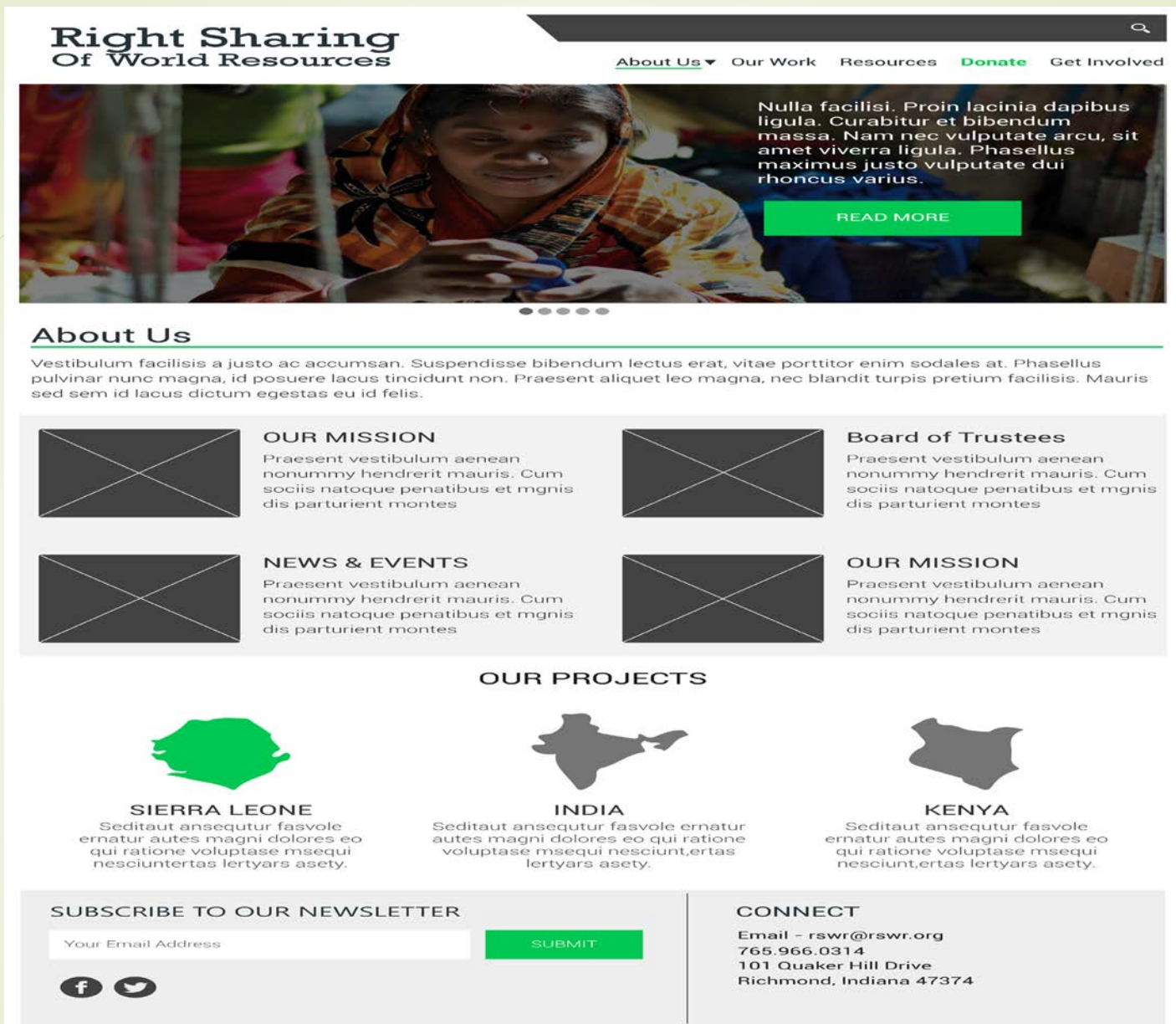
Connect

Email us:
rswr@rswr.org

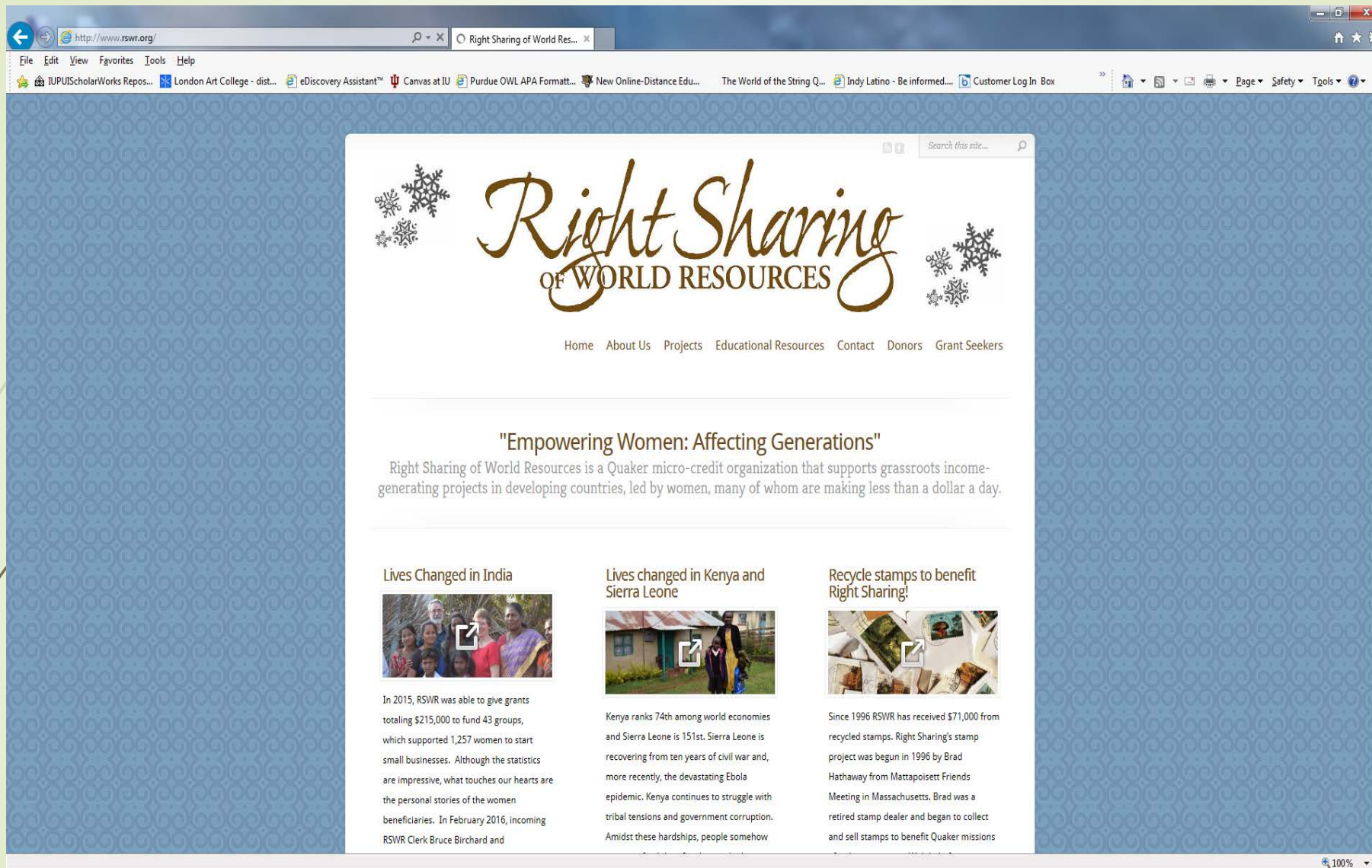
Phone:
765.966.0314

Address:
101 Quaker Hill Drive
Richmond, Indiana 47374

Initial wireframe for front page of the Right Sharing of World Resources website



Initial wireframe for About Us page for Right Sharing of World Resources website



Current website for Right Sharing of World Resources

Can We Apply the Test from *Computer Associates International, Inc. v. Altai, Inc.*?

- For computer program design – for non-literal elements of computer programs
- Idea v. expression dichotomy
- Abstraction
- Filtration
 - Elements dictated by efficiency
 - Elements dictated by external factors
 - Elements taken from the public domain (scènes a faire)
- Comparison
- Policy considerations – computer programs are literary works – comparable to websites

Protecting Websites Via Copyright Registration

- Fortunately, the U.S. Copyright Office provides a wealth of resources that provide guidance on how to handle the registration of websites, including websites, files and documents that are transmitted or downloaded via a network.
- For example, *Circular 66* covers copyright registration for online works.
 - For all online works other than computer programs and databases, the registration will extend only to the copyrightable content as received in the Copyright Office and identified as the subject of the claim. The application for registration should exclude any material that has been previously published or that is in the public domain. For published works, the registration should be limited to *the content of the work asserted to be published on the date given on the application*.
- The *Circular* provides additional clarification in a note.

The Note:

- For a claim in a computer program that establishes the format of text and graphics on the computer screen when a website is viewed (such as a program written in html), registration will extend to the entire copyrightable content of the computer program code. It will not, however, extend to any *website* content generated by the program that is not present in the identifying material received and that is not described on the application. On the other hand, for all other computer programs that are transmitted or accessed online, as well as for online automated databases, the registration extends to the entire copyrightable content of the work owned by the claimant, even though the entire content is not required in the identifying material deposited.

But With Websites

- However, one of the major issues with websites is that the content is dynamic and the overall design may be revised on a regular basis as well.
- Thus, the question becomes whether to register each revision to the website or to consider an alternate way to offer at least some measure of protection.
- Another option is to design the website so that as much of it as possible will change only infrequently, minimizing the need to keep registering multiple pages for what are very minor changes.
- In terms of website design and branding, Ms. Pachhapurkar is endeavoring to develop the new website for Right Sharing of World Resources so that its overall “look and feel,” including graphical elements and information architecture, will last for at least five years with updated content to some sub-pages being the only difference.

The *Circular* Clearly Explains How to Handle Revisions and Updates

- Many works transmitted online, such as websites, are revised or updated frequently. Generally, copyrightable revisions to online works that are published on separate days must each be registered individually, with a separate application and filing fee (unless it meets the requirements in the following two sections). Registration of a revised version covers only the new or revised material added. The version of the work that is deposited should be the same version described on the application; thus, the title and dates on the application should correspond with those on the deposit copy.

What About Databases?

- Databases are another typical kind of content that might be accessible through a website.
- According to *Circular 66*, "[i]n some cases, a frequently updated online work may constitute an automated database. A group of updates, published or unpublished, to a database, covering up to a three-month period within the same calendar year, may be combined in a single registration."
- Section 1002.6 of the *Compendium of U.S. Copyright Office Practices* provides additional guidance about when a database is eligible for copyright protection.
- However, as clearly indicated, "[w]ebsites are not considered databases for the purpose of copyright registration."
- In Section 1006.1(B) on databases, the *Compendium* asserts that a website is not considered a database and that there currently is no group registration for website revisions made over a period of time.

Can Websites Be Considered a Serial or Newsletter?

- Another possible option for handling the dynamic content of websites, particularly websites that have regular or intermittent blog postings, podcasts or videos, is whether they can be considered a serial or newsletter.
- According to *Circular 66*: Group registration (a single registration covering multiple issues published on different dates) is available for series (*published weekly or less often*) and daily newsletters (*published more often than weekly*), including those published online. The requirements vary, depending on the type of work.
- Note that there are very specific rules for what qualifies for each of these types of materials.
- For example, *Circular 62A* makes it clear that this type of group registration is limited to only newspapers that are published daily.
- A note in *Circular 66* indicates that “[g]roup registration for serials is available only if the claim is in a ‘collective work.’ Thus, group registration is *not* available for electronic journals published one article at a time because such works are not collective works.”

Is the Website Published or Unpublished?

- One additional consideration for registering a website is determining whether the work is published or unpublished.
- As indicated in Circular 66, "[t]he definition of 'publication' in the U.S. Copyright law does not specifically address online transmissions."
- There are also specific rules about the procedure when the same work is published both online and by the distribution of printed copies.
- N.B.: The guidelines are very confusing on this question. Considerable research is needed to make a determination of whether a website is published or unpublished.

Another Consideration in Registering Websites

- Another aspect of choosing how to register a website concerns infringement, specifically the amount of statutory damages that can be awarded, with Section 1008.7 of the *Compendium* providing helpful information.
 - In determining whether to register the content of a website separately or together the applicant should consider the potential impact on the copyright owner's ability to seek damages in the event that a third party infringes that content.
 - Consequently, registering a number of self-contained works that appear on a website together as a compilation, collective work, or derivative work may have significant consequences in a copyright infringement action.
 - For example, when a website consisting predominantly of photographs is registered as a compilation, a court may issue only one award of statutory damages for all the photographs covered by that registration.

Websites Are a Mixture of Content, Not All Contributed by the Same Person

- Section 1009.1 of the *Compendium* notes that “[m]any websites contain multiple forms of authorship, including text, images, artwork, musical works, sound recordings, videogames, computer programs, audiovisual works, among other types of works.”
- Detailed information is provided on each type of work as well as what to do if an item is a mixture of more than one type of work, such as a blog that is mostly text but that also contains some images.
 - Literary works, including articles, blog postings or computer programs, databases, compilations of information, or other works that are expressed in numbers or other verbal or numerical symbols or indicia.
 - Works of the visual arts
 - Works of the performing arts
 - Sound recordings
 - Motion picture/audiovisual material
 - Single issue serial

But...

- Interestingly, per 1006.1(A), "[t]he Office will not register HTML code as a computer program, because HTML does not constitute source code."
- "HTML code is a markup language that merely formats the text and files on a webpage in much the same way that the codes in a word processing program format the characters and spaces in a document."
- And yet, as part of DreamWeaver, the HTML code is often referred to as "source code."

How to Register Websites, Per the *Compendium*

- The *Compendium* includes considerable detail on exactly how to register website content, including that:
 - the material being deposited must match the material claimed in the application (1010.5)
 - deposit requirements for the initial and subsequent versions of a website as well as revised website content (1010.6(A), (B) and (C))
 - compilations (1010.6(D))
 - HTML Code (1010.6(E))
 - computer programs contained or embedded in a website (1010.6(F))
 - databases contained or embedded in a website (1010.6(G))
 - electronic serials (1010.6(H)).

“Best Edition” Requirement

- The requirement to provide a “best edition” of a work when registering may cause concern.
- However, per Section 1010.3, “[i]n most cases, the applicant does not need to satisfy the best edition requirements in order to register a website or to register a work that has been published solely online.”
- Rather, the applicant may submit an electronic copy of the work, provided that the deposit is in one of the acceptable file formats that are posted on the Copyright Office’s website.

What About Post-Registration for Updated Websites?

- ▶ The *Compendium* has an entire Chapter on post-registration procedures.
- ▶ Note that the focus of many of the provisions in the Chapter is on correcting errors from the original registration.
- ▶ Counsel should review this material carefully to see whether any of it provides an avenue for covering very slight changes in website content under the original registration process.

Some Types of Material Are Not Eligible for Registration

- Unfortunately, the *Compendium* makes it clear that there are some types of material that are not eligible for registration in Section 1007.
- A registration for a claim in website content does not extend to any uncopyrightable material contained within a website.
- In particular, the U.S. Copyright Office will refuse to register website content that does not constitute copyrightable subject matter or content that lacks a sufficient amount of original authorship.
- Examples of uncopyrightable material include, but are not limited to, the following:
 - Ideas, such as plans for future websites.
 - Functional design elements.
 - Domain names and hypertext links.
 - The layout, format, or “look and feel” of a website. (Italics mine.)
 - Common, unoriginal material, such as names, icons, or familiar symbols

Protecting Websites Under Copyright Law Without Registration

- Yezril discusses the clear tension between true creativity as expressed by website developers and the need for standardization, not only to enhance usability but also because of the challenge to deliver sufficient content on smaller and smaller devices.
- Among the challenges faced when trying to protect website design under copyright law are originality, functionality and substantial similarity as well as merger and scenes a faire.
- The reality of the design world is that designers take inspiration from collections of other websites (as Ms. Pachhapurkar did with her analysis of 70 NGO websites).
- However, even in the absence of a legal ownership (such as when a work is made for hire), designers still feel ownership in their work.
- Yezril notes that even with looking at other websites for inspiration and with common trends in the industry, "there has evolved an implicit code of ethics, in which copying of elements is permissible, but only in moderation."

Other Options?

- In Part IV of her article, the author addresses a number of different scenarios of copyright infringement of websites, including clients who do not pay, copying by a client's competitors, copying in bad faith and "pure" design copying.
- In her conclusion, she states that "[d]esigners have relatively little interest beyond client payment and the reputational attraction of future clients."
- She goes on to observe that "[t]here are other legal avenues to protect a website design, such as laws on topics of contract or unfair competition, so perhaps the question should be whether it is worth bothering with intellectual property protection for web design at all."

C in a Circle - A Simple Solution?

- In her final paragraph, Yezril offers a simple solution:
 - Perhaps the optimal solution, which balances the freedom to take inspiration and the desire to protect creative website design, lies in the (C) symbol itself, which derives significance not in legal strength, but rather in the cultural expectations of the web design community.
- She notes that, in the absence of viable legal alternatives, the (C) works in a notice and deterrent role.
 - The insignificance of the legal function of the (C) at the bottom websites is demonstrated by its failure to channel more parties to court when conflicts occur. This notice is a signal that self-respecting designers taking inspiration from a given site should not copy directly.

Cont.

- Indeed, this is something that the presenter has advocated for her students for many years.
- Although the presenter promotes copyright registration as the most effective way to ensure the strongest rights to the work, a second option that is easy to do and costs nothing is to place a copyright notice on everything.
- This has several advantages: reminding the honest person that there is copyright protection, even for digital materials, provides an opportunity to “do the right thing” by including contact information to ask for permission, eliminates the “innocent infringer” defense and it can be placed on everything at no cost, including websites, DVDs, videogames, storyboards, etc.
- In fact, the notice can be embedded into the HTML code as part of a banner, “header” or “footer” of every page, so that the notice appears automatically.

VARA-Type Rights – An Option for the Future?

- In discussing these issues with another one of her graduate students, the presenter was reminded again that no matter what web content is provided, the creators are generally most interested in the integrity of the work and that the work be attributed to them (rather than presented as the work of someone else), even though they understand that their work may be retransmitted and repurposed in a number of different ways.
- In some ways, this mirrors the integrity and attribution rights provided under the Visual Artists Rights Act (VARA), leading to a discussion of whether this legislation could be a model for how to handle website design issues that reflect a designer's creative talents and that impact his/her reputation and future career opportunities.

Other Options?

- It is worthwhile to remember that copyright protection attaches the moment when three criteria are met: an original work of authorship, fixed in a tangible medium and with a minimum amount of creativity.
- Thus, registration is not necessary unless and until a party wants to sue for copyright infringement.
- There may be interim measures that can be taken, such as communicating with a party who may be infringing on someone's copyright, short of bringing litigation.

Other Options?

- Another option may be to see what recourse is available through the Digital Millennium Copyright Act, either working with the ISP that is hosting the infringing content to arrange to have the site or its content taken down or to pursue a remedy for the destruction, removal or alteration of copyright management information (CMI).
- This legislation goes to the heart of how easy it is to cut and paste content from the web.
- On the other hand, with how quickly website content – and even website design – changes, it may not even be worth going to great lengths to try to enforce copyright rights at all.
- All of these considerations should be weighed when thinking about how and whether to protect websites under copyright law.

More Education Needed About Copyright Law

- One other aspect of protecting websites and other digital content is education.
- There are many myths and misconceptions about copyright law in general among the public.
- The presenter finds that the concept of “fair use” is often relied upon for all types of behavior when it really is an exception to the rights of the copyright owner and where liability for copyright infringement is determined using a four-factor test.
- On the other hand, it is important to remember that fair use was intended to provide an opportunity to use someone else’s material without permission for news reporting, commentary, criticism, scholarship, research and parody, but not for commercial use.
- An interesting intersection with rights under the First Amendment.

Cont.

- Because her school offers programs in informatics and media arts, the essence of which are creating all types of creative work, the presenter developed a course called N480 Technology and the Law, which covers patent, trademark, trade secret and copyright law as well as contracts, licensing and rights of publicity, so that the next generation of web designers will know how to protect their own work as well as avoid infringing on the rights of others.
- AIPLA has taken the lead on providing programs to even younger students as part of World Intellectual Property Day.
- In this era of rampant piracy of all types of products as well as nearly unchecked cutting, pasting, redistribution and aggregation of all forms of creative work, it is not surprising that people are confused about what might be permissible versus prohibited under intellectual property law and why.

Protecting Websites Using Trade Dress Law

- ▶ Another option for protecting websites is using trademark law, specifically trade dress. As indicated by Jones, Rafaty and Ginzburg, “[c]ourts have found that the Lanham Act may protect the highly distinctive trade dress of a website.”
- ▶ As they caution:
 - ▶ Trade dress must be described in terms of its specific elements, which in turn must be nonfunctional and distinctive in order to be protected under the Lanham Act. In this regard, establishing secondary meaning and acquired distinctiveness may be particularly difficult when a website is changed or updated frequently, and the analysis may well hinge on the aspects or elements of the website that remain constant over time.

Cont.

- ▶ They go on to observe that:
 - ▶ The “look and feel” of a website – for example, its user interface, design layout, graphic elements – may be protectable as trade dress, but the “overall impression” of the website must be closely tied to particular identifiable/articulable elements that form the basis for the trade dress claim. These elements include static elements (for example, images, graphics, photos, colors, frame), as well as interactive elements and the website’s overall “mood,” style or impression.
- ▶ The authors advise that website trade dress infringement claims should identify and describe as many of these elements as possible and as specifically as possible, especially any intangibles that contribute to the overall “look and feel” of the website, such as the user interface, design style and specific features.

Cont.

- The authors note that at least three courts have held that the look and feel of a website may be the basis for a trade dress claim that is distinct from copyright claims.
- Among the cases that the authors use to illustrate the application of trade dress to websites are:
 - *Blue Nile, Inc. v. Inc.com, Inc.*, 478 F. Supp. 2d 1240 (W.D. Wash. 2007).
 - *Faegre & Benson LLP v. Purdy*, 447 F. Supp. 2d 1008 (D. Minn. 2006); *Faegre & Benson LLP v. Purdy*, 129 Fed. App'x 323, 324 (8th Cir. 2005).
 - *Conference Archives, Inc. v. Sound Images, Inc.*, 2010 U.S. Dist. LEXIS 46955 (W.D. Pa. Mar. 31, 2010).
 - *Sleep Science Partners v. Lieberman*, 2010 U.S. Dist. LEXIS 45385 (N.D. Cal. May 10, 2010).

Cont.

- In the update to their chapter on unique online trademark issues, Hogan and Feingold noted several more recent cases related to trade dress protection of websites:
 - *Parker Waichman LLP v. Gilman Law LLP*, wherein the court concluded that the plaintiff had “fail[ed] to adequately define the ‘look and feel’ of the Web site at “YOURLAWYER.COM.”
- They also note that in affirming the lower court’s dismissal of a trade dress claim, the Third Circuit explained that the plaintiffs failed to “enumerate what specific elements of its Web site comprise a distinctive trade dress or that its site has any distinctive ornamental features.”
- Moreover, the court also noted that even if the plaintiff had adequately stated its claims, its alleged trade dress is clearly functional.

Cont.

- Brown alerts readers to the real damage being done to companies and the economic impact on legitimate commerce when websites, particularly the look and feel of websites, are not protected adequately by either copyright or trade dress law.
- She discusses the ambiguous nature of protection for the look and feel of websites, noting especially the *Conference Archives* and *Blue Nile* cases.
- She then illuminates the limitations of trying to protect the look and feel of a website via copyright law, describing a number of cases as well as the language in *Circular 66* from the U.S. Copyright Office.
- She highlights the difficulties with protecting a website's look and feel under trade dress law, including the need to prove that the trade dress is distinctive, that it has acquired secondary meaning, that is it non-functional, the likelihood of consumer confusion and that copyright law would preempt any attempt to use trade dress.

Cont.

- As a solution to this dilemma, Brown proposes two options.
 - One option is that the Lanham Act be amended to specifically address the trade dress infringement of websites.
 - The other option is that a multi-factor test be adopted for infringement of a website's look and feel that would also guard against restricting fair competition and that would consider overall similarity, including features such as fonts, color scheme, layout and user experience design, the proximity of products or services in relevant markets, whether there was intentional copying and the likelihood of consumer confusion.

Cont.

- Melus is a strong advocate for applying trade dress to protect website design.
- He first discusses why trying to apply copyright law to web design is akin to trying to “fit a commercial peg into an artistic hole,” especially when the issue is the protection of a website’s look and feel.
- He then asserts why trademark law, especially trade dress, is a commercially sound approach to protecting website design.
- He explains why a trade dress analysis provides broader protection to website design than copyright law.
- As he concludes, “[c]opyright does not effectively assign a property right to exclude competitors from appropriating the design and interface, the “look and feel” of websites, which form the basis of a website’s intrinsic value.”
- He goes on to state that “[t]rade dress, which protects the efforts of businesses to establish positive relationships with its consumers by creating intuitive user interfaces is much more apt to protect web design” and advocates that courts should follow the example of the decision in *Conference Archives* and apply a trade dress analysis to web design.

Graphical User Interfaces (GUIs) and Apps

- Although the focus of this paper is on the application of intellectual property law to websites, two other popular online technologies are relevant to thinking about how to provide protection for digital assets that are the result of innovation and that have the potential to generate revenue for those that develop them: graphical user interfaces (GUIs) and apps (short for applications).
- As stated by Clark and Davis:
 - Assessing proprietary subject matter and determining the most appropriate type of IP regime to apply can be anything but straightforward, particularly when the item to be protected presents elements that are protectable simultaneously by a trademark, copyright, or patent. This issue is particularly acute when a product has ornamental features that may be protected by either copyright or a design patent.

Cont.

- ▶ Two substantial law review articles have recently been published on the difficulties of protecting GUIs through intellectual property law.
- ▶ The first of these articles is a magnificent treatise by Risch on functionality and design patents for GUI.
- ▶ What is new is the extent to which GUIs have become an integral part of many digital products and content, particularly for smaller and smaller mobile devices, as well as a visual display for interacting with software that serves as a vehicle for e-commerce and branding opportunities.
- ▶ Stigler observes that in spite of fierce competition in the marketplace, GUIs remain inadequately protected under current intellectual property law in the U.S.
- ▶ The final section of Stigler's article is devoted to a proposal for a GUI hybrid, a GUI *sui generis* that would be "specifically tailored for GUIs" and that would "draw upon the best-suited features of design patent, trade dress and copyright law."

Cont.

- Likewise, protection for apps under intellectual property law, especially copyright law, is problematic.
- It is the dream of many students to create apps that will be the basis for a career or new company and many people think nothing of taking and “modifying” someone else’s app, perhaps believing that this behavior is permitted under fair use.
- Another aspect of this is that people often confuse plagiarism with copyright infringement.
- However, as one author notes, “[t]he issue is that, as the barriers to producing mobile apps have lowered and the amount of revenue flowing into them has increased, the checks and balances against copyright infringement have not increased either.”

Cont.

- Advocating more action by the app stores to discourage the submission of copyright infringing apps, the author makes the following suggestions:
 - 1. Ban copyright infringers.
 - 2. Look for warning signs.
 - 3. No ill-gotten gains.
- In terms of those who want to create apps for the iPhone, Bowerman makes some helpful recommendations.
 - The best way to avoid a copyright problem with your app is to design it yourself, focus on the user experience and avoid borrowing elements from existing apps. It's OK to be inspired by something you see, but copying and pasting graphics or making your app look like another can cause you big problems. Creating your own app with your own content will ensure you never find yourself on the receiving end of a copyright infringement lawsuit.

In Conclusion

- One popular expression comes to mind when the author contemplates the application of intellectual property law to websites, GUIs and apps.
- This expression, whose origin is disputed, is the pronouncement “[m]ay you live in interesting times.”
- It aptly captures the current state of affairs as lawyers try to assist their clients in protecting ever more valuable and expansive activities delivered through web and mobile technologies.
- The challenges have increased in terms of how each new technology that is introduced requires the law, the lawyers who practice it and the clients who depend on it to apply traditional principles that do not necessarily fit well and these challenges will continue to evolve in the future.
- All of which means that lawyers who practice intellectual property law will indeed live in interesting times!

Any Questions?

Thank you for attending the 2016 AIPLA Spring Meeting!